

TRIAL PROCEDURE ORDER - CIVIL TRIAL

**MICHAEL R. BARRETT
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
AT CINCINNATI**

I. PRETRIAL PROCEDURE

A. Discovery Conference, Joint Discovery Plan and Mandatory Disclosure¹

1. Discovery Conference

As soon as all counsel are identified, all counsel shall agree on a date for the discovery conference required by Fed. R. Civ. P. 26(f).

2. Joint Discovery Plan²

Following the discovery conference, the parties shall file the discovery plan required by Fed. R. Civ. P. 26(f). The parties shall use the required Joint Discovery Plan form, which can be found at www.ohsd.uscourts.gov.

3. Mandatory Disclosure

Unless otherwise agreed in the discovery plan, the parties shall make the disclosures required by Fed. R. Civ. P. 26(a)(1) within fourteen (14) days after the discovery conference.

B. Counsel Not Admitted in the Southern District

Counsel admitted to practice before the highest court of any state may move to be admitted in the Southern District of Ohio for purposes of appearance in a specific

¹Under Fed. R. Civ. P. 26(a)(1)(E), the following categories of cases are exempt from the requirements for a discovery conference, a discovery plan, and mandatory disclosure: (i) an action for review on an administrative record (e.g. Social Security benefits and certain ERISA cases), (ii) a petition for habeas corpus, (iii) a *pro se* prisoner action, (iv) an action to enforce or quash an administrative subpoena, (v) an action by the United States to recover benefit payments, (vi) a government student loan case, (vii) a proceeding ancillary to actions in other courts, and (viii) an action to enforce an arbitration award.

²Attorneys can obtain all the pretrial procedures and forms used by visiting our website at www.ohsd.uscourts.gov. Click on Judges and then on Procedures and Forms. Attorneys lacking internet access can contact the Court's Courtroom Deputy, Barbara Crum.

case. Counsel must attach to the motion for admission *pro hac vice* a Certificate of Good Standing issued by the highest court of any state, and the appropriate filing fees. See S.D. Ohio L.R. 83.5. Permission will be conditional only and may be withdrawn at any time. See *Leis v. Flynt*, 439 U.S. 438 (1979).

Counsel admitted *pro hac vice* shall obtain local counsel who is familiar with the procedures in the Southern District of Ohio. Counsel admitted *pro hac vice* are also expected to familiarize themselves with, and to follow, the Southern District of Ohio Civil Rules, as well as all standing orders of this Court.

The order granting admission *pro hac vice* is conditioned upon counsel's registration and participation in the court's electronic filing system.

C. Discovery

THIS COURT DOES NOT PERMIT DISCOVERY MOTIONS, *i.e.* motions to compel or motions for protective order regarding discovery disputes, unless and until counsel use the following procedure: Counsel must first attempt to resolve disputes by extrajudicial means (required by S.D. Ohio Civ. R. 37.1 and 37.2). This Court defines "extrajudicial means" as requiring counsel to try to resolve the matter both in writing and telephonically. If counsel are unable to resolve the dispute between themselves, then they must contact the Court's Courtroom Deputy, Barbara Crum by either telephone (513-564-7699) or by email at barrett_chambers@ohsd.uscourts.gov, and a telephone conference with all counsel and the Court will be scheduled as soon as possible.

NEITHER COUNSEL NOR THE PARTIES SHALL PRESUME THAT A PENDING MOTION RELIEVES THEM OF THEIR OBLIGATION TO CONDUCT DISCOVERY WITHIN THE DEADLINES SET FORTH BY THE CASE SCHEDULE.

D. Motions

Other than motions required by law to be set for a hearing, with notice given to all counsel, and motions upon which a specific request for a hearing has been made and granted by the Court, all motions shall be submitted without oral argument on the memoranda filed with the Clerk, on the schedule set forth in S.D. Ohio L.R. 7.2, unless otherwise ordered.

THE COURT REQUIRES ALL COUNSEL TO SUBMIT A HARD COPY TO CHAMBERS OF ANY DISPOSITIVE MOTIONS, OPPOSITIONS AND REPLIES THERETO. THESE SUBMISSIONS MUST CONTAIN ALL RELATED ATTACHMENTS.

S.D. Ohio Civ. R. 7.2(b)(4) states:

UNREPORTED OPINIONS. If unreported or unofficially published opinions are cited, copies of the opinions shall be made available upon request by the Court or opposing counsel.

For each motion, counsel shall submit a proposed order, in WordPerfect format, by email to barrett_chambers@ohsd.uscourts.gov.

E. Limitations on Briefs and Memoranda

BRIEFS AND/OR MEMORANDA IN SUPPORT OF OR IN OPPOSITION TO ANY MOTION IN THIS COURT SHALL NOT EXCEED TWENTY PAGES WITHOUT FIRST OBTAINING LEAVE OF COURT. A motion for leave must set forth the reasons excess pages are required and the number of pages sought.

If leave of Court is granted, counsel must include: (1) a table of contents indicating the main sections of the memorandum, the arguments made in each section, and the pages on which each section and subsection may be found; and (2) a succinct, clear, and accurate summary not to exceed five pages of the principal arguments made and citations to the primary authorities relied upon in the memorandum. All briefs and memoranda shall comply with the formal requirements of S.D. Ohio Civ. R. 7.2.

In the spirit of compliance with the rules, all briefs and memoranda shall comport with the following:

1. One-inch margins top, bottom, left and right.
2. Main body of text a minimum of 12-point font and footnotes in 10-point font.
3. Citations to be in main body of text and not in footnotes.

F. Settlement Conference

1. Settlement Authority

In an effort to encourage settlements, the Court may schedule a settlement conference at any time. Counsel also may request that a conference be scheduled at any time when it appears such a conference would be fruitful. **ATTORNEYS ATTENDING SETTLEMENT CONFERENCES MUST BRING THE PARTY, PRINCIPAL, OR AGENT WITH FULL SETTLEMENT AUTHORITY.**

By full settlement authority, the Court means the person or persons attending must have the authority independently to make necessary financial and settlement decisions.

2. *Ex Parte* Settlement Letters

Each counsel must prepare and submit a detailed *ex parte* letter no longer than five pages to the Court five (5) business days prior to the conference with a synopsis of the case and the status of any settlement negotiations to date. These letters may be delivered to Chambers or emailed to barrett_chambers@ohsd.uscourts.gov. These letters will be held in confidence by the Court, should not be filed with the Clerk's Office, and may be, but do not have to be, exchanged with opposing counsel.

G. Final Pretrial Conference

Approximately thirty (30) days prior to the trial date, a Final Pretrial Conference will be held. At least five (5) business days prior to the Final Pretrial Conference, counsel shall submit the jointly prepared Final Pretrial Order by email to barrett_chambers@ohsd.uscourts.gov. This statement should not be filed with the Clerk's office. The required form is available at www.ohsd.uscourts.gov. Click on Judges and then on Procedures and Forms. Attorneys lacking internet access can contact the Court's Courtroom Deputy, Barbara Crum.

Additionally, counsel will submit a joint statement of the case to be read by Judge Barrett to the jury at Voir Dire. This statement shall be emailed to Chambers at barrett_chambers@ohsd.uscourts.gov three days prior to the commencement of trial.

All trial counsel must be present at the Final Pretrial Conference. If no formal settlement conference has been held previously, attorneys must bring the party, principal, or agent with full settlement authority to the Final Pretrial Conference.

In the event that counsel agree to submit the entire case on cross motions for summary judgment, the Final Pretrial Conference and trial dates will be vacated.

H. Trial Assignments - Trailing Docket

The Court utilizes a modified "trailing docket." Multiple cases will be scheduled for trial during each setting. Criminal cases may also be scheduled and will take precedence under the Federal Speedy Trial Act. As to civil cases, the Court will determine which case shall proceed. If your case does not proceed, it will be rescheduled. If your case settles, you must immediately notify the Court.

NOTE: Should a case settle after 12:00 p.m. on the business day immediately preceding the trial date, the Court may assess against either or both parties the costs of summoning a jury. A case will be considered settled for the purposes of this provision when notice thereof is given to the Court. A hearing may be held before such costs are assessed, if requested by the parties.

If, for any reason, counsel wish to have their case advanced for trial to the earliest available date, they may contact the Courtroom Deputy to be placed on a “standby” list. Should any trial setting be vacated by a settlement or continuance of other trials, counsel would be contacted to determine whether they wish to utilize the newly available time slot.

I. Witnesses

1. Lay Witnesses

Each party shall disclose to opposing counsel the names of all lay witnesses on the date set forth in the Court’s Preliminary Pretrial Order.

2. Expert Witnesses

a. Disclosure

Each party shall disclose to opposing counsel, pursuant to Fed. R. Civ. P. 26(a)(2), the identity of all expert witnesses on the dates set forth in the Court's Calendar Order. No disclosure may list more than five (5) experts without specific Court permission.

b. Use at Trial

The Court generally permits the parties to briefly qualify their experts at trial. Opposing counsel may *voir dire* any such witness if his or her expertise is questioned.

J. Deadlines

Parties are reminded that all deadlines set forth in this Order, in the Calendar Order, in the Final Pretrial Order, and in any other Order issued by this Court are firm deadlines. The parties **SHALL** file all required documents by the dates set forth in these Orders unless prior approval of the Court for filing on a later date has been obtained. The Court can and will impose sanctions, including monetary sanctions, for failure to meet these deadlines.

If a motion for an extension of time is filed, such motion shall include whether or not the opposing party consents to the extension.

K. Attorney Fees

The parties may stipulate the amount of attorney fees due to counsel. In the absence of stipulation, counsel shall submit his/her motion and affidavit reflecting the reasonable attorney fees and expenses in this matter. Each activity to be

reimbursed should be listed, together with date, the number of hours or portion thereof and the nature of the activity. Counsel shall have fourteen (14) days from the date of judgment to submit his/her fee application. Opposing counsel shall respond ten (10) days after receipt of the application.

II. TRIAL PRACTICE

Conduct of counsel during all Court appearances will be governed by the following instructions:

A. Counsel Tables

The parties will occupy the counsel table designated by the Court's Courtroom Deputy before the opening of the first session of the trial.

B. Court Sessions

Under ordinary circumstances, trials of no more than two weeks duration will be held Monday through Friday.

Trial hours are generally 9:00 a.m. to 12:30 and 2:00 p.m. to 5:00 p.m. with a 15-minute break in the morning and the afternoon.

The parties and all counsel shall be present at counsel tables at all sessions before the jury is brought into the courtroom, and will remain at counsel tables until after the jury leaves the courtroom at the end of all sessions. The parties and counsel will stand upon the entrance and exit of the jury.

Counsel and the parties shall be present in the courtroom one half (½) hour before Court convenes every day. The purpose of this requirement is to resolve any problems that may arise during the course of this trial. If counsel need to bring anything to the Court's attention, they should contact the Court's Courtroom Deputy or Law Clerk before 8:30 a.m. so that the Court can resolve the matter before the jury is brought into the courtroom. Counsel should also be readily available for conferences during recesses. Please keep the Courtroom Deputy informed as to where you may be located in case the Court needs to find you quickly.

C. Addresses by Counsel

Counsel will address the Court and the jury in the following manner:

1. *Voir dire* examination, opening statements and closing arguments will be conducted from the lectern facing the jury.
2. Counsel shall stand when addressing the Court for any reason.

D. Decorum

Colloquy or argument between counsel shall not be permitted. All remarks shall be addressed to the Court.

Appearance, mannerisms, or habits that are designed to arouse the sympathy or prejudice of the jury are an impediment to an impartial trial and will not be permitted.

During a trial, counsel shall not exhibit familiarity with witnesses, jurors or opposing counsel and shall avoid the use of first names.

During opening statements and final arguments, all persons at counsel table shall remain seated and be respectful so as not to divert the attention of the Court or the jury.

Do not ask the court reporter to mark testimony. All requests for re-reading of questions or answers shall be addressed to the Court.

E. Voir Dire Examination

The whole panel of prospective jurors (*i.e.*, those in the jury box and those seated in the rear of the courtroom) will be examined in one continuous examination.

Counsel will be provided with a list of the prospective jurors prior to the commencement of trial. Counsel can contact the Jury Commissioner, Kendra Jordan, three days before trial at 513-564-7511 to obtain the juror questionnaire forms.

Additionally, each prospective juror will be assigned a seat number and given a corresponding index card. During jury selection, Counsel shall refer to prospective jurors by that seat number and not by name.

In most cases, eight (8) prospective jurors will be seated in the jury box. Pursuant to Fed. R. Civ. P. 48, unless the parties stipulate otherwise, the verdict shall be unanimous and by a jury of at least six members. The Court generally will assign three peremptory challenges to each side. However, the Court recommends in cases of less than two weeks that eight jurors be seated with four preemptory challenges.

The Court will conduct a preliminary *voir dire* examination and counsel may supplement the Court's examination.

Background information is contained in juror questionnaire forms which are on file in the Clerk's Office. Counsel should examine these questionnaires prior to the

commencement of trial. Counsel may inquire regarding any omission in a juror's answer to the juror questionnaire or regarding information contained in the juror questionnaire. Counsel must return juror questionnaire forms to the Jury Commissioner.

F. Challenges for Cause

The entire panel will be subject to challenge for cause (*i.e.*, jurors seated in the jury box and in the rear of the courtroom). Challenges for cause will be exercised outside of the presence of the jury (either in a conference room or at sidebar).

G. Peremptory Challenges

The parties will exercise their peremptory challenges alternately with the plaintiff exercising the first challenge. Subject to discussion with counsel, if either party "passes," the challenge will be counted as used. If both parties "pass" on a particular round, the preemptory challenges may be deemed concluded. Peremptory challenges will be exercised outside of the presence of the jury (either in a conference room or at sidebar). Any prospective juror on the panel may be so challenged. Challenges to the manner in which an opposing party has exercised peremptory challenges (*e.g.*, a *Batson* argument that a party's challenges are racially discriminatory) shall be made before the jury is sworn and before the extra venire persons are excused; otherwise, they are waived.

At the conclusion of the peremptory challenges, the Court's Courtroom Deputy will announce the composition of the jury, which shall be the first eight remaining on the list.

H. Jury Instructions & Verdict Form

If there are no dispositive motions pending, then the Jury Instructions, including interrogatories and special verdict forms, shall be submitted by email, in WordPerfect format, to barrett_chambers@ohsd.uscourts.gov contemporaneously with the submission of Proposed Final Pretrial Order, which is due at least five (5) business days prior to the Final Pretrial Conference.

If there are pending dispositive motions, then the preliminary Jury Instructions, including interrogatories and special verdict forms, shall be submitted by email, in WordPerfect format, to barrett_chambers@ohsd.uscourts.gov at least ten (10) business days prior to the commencement of trial.

In addition, all of the above shall be electronically filed in the Clerk's Office contemporaneously with the submission to Chambers. There is reserved to counsel the right to submit supplemental requests for instructions during trial, or at the

conclusion of the evidence, but only on matters that cannot be reasonably anticipated.

The parties shall submit joint instructions in the form set forth in the example attached to the Final Pretrial Order form.

A request for special instructions must be filed with the Clerk prior to presentation to the Court.

In diversity and other cases where Ohio law provides the rules of decision, use of Ohio Jury Instructions (“OJI”) as to all issues of substantive law is required. As to all other issues, and as to all issues of substantive law where Ohio law does not control, counsel should use:

1. Sixth Circuit case law;
2. Federal Jury Practice and Instruction by O’Malley, Grenig & Lee; or
3. Any pattern jury instructions published by a federal court. (Care should be taken to make certain substantive instructions on federal questions conform to Sixth Circuit case law.)

I. Examination of Witnesses

Counsel shall generally conduct their examination from the lectern.

When a party has more than one attorney, only one may conduct the direct or cross-examination of a given witness.

Counsel shall not approach a witness without asking the permission of the Court. When permission is granted for the purpose of working with an exhibit, counsel should resume the examination from the lectern when finished with the exhibit. In most cases, the courtroom deputy will place exhibits before the witness.

J. Doctors and Other Professional Witnesses

It is the Court’s position that treating physicians are not expert witnesses to the extent that they are called as fact witnesses. If, however, a treating physician gives a prognosis, then he will be deemed an expert.

The Court will attempt to cooperate with doctors and other professional witnesses and will, to the extent practicable, accommodate their schedules by permitting them to testify out of order. Counsel should try to anticipate any such difficulty and reach an agreement, wherever possible, to achieve a minimum of disruption to both the trial and the witness's schedules.

Irreconcilable conflicts shall be brought to the attention of the Court as soon as counsel become aware of the problem.

K. Objections

Counsel will stand when making an objection and will make the objection directly and only to the Court.

When objecting, state only that you are objecting and if requested by the Court, state the grounds. Objections shall not be used for the purpose of making speeches, repeating testimony, or attempting to guide a witness or influence the jury.

Argument upon an objection will not be heard unless permission is given or argument is requested by the Court. Either counsel may request a bench conference.

L. Exhibits

COUNSEL ARE REQUIRED TO LIST ALL EXHIBITS IN THE FINAL PRETRIAL ORDER.

Plaintiff's exhibits shall be marked as "PX#" and Defendant's exhibits shall be marked as "DX#." Counsel must use Arabic numbers. Exhibit markers should be attached to all exhibits at the time they are shown to opposing counsel during the preparation of the pretrial order. A supply of marking tags for exhibits may be obtained from the Clerk's Office. They should be attached to the lower right-hand corner whenever possible.

Except for good cause shown, the Court will not permit the introduction of any exhibits unless they have been listed in the pretrial order, with the exception of exhibits to be used solely for the purpose of impeachment.

Exhibit lists shall be in the form set forth in the example attached to the Final Pretrial Order form.

Three sets of each party's exhibits shall be delivered to Chambers at least three (3) days prior to the commencement of trial, this includes one original and two copies.

If any sketches, models, diagrams, etc. will be used during trial or in argument, they must be exhibited to opposing counsel not later than the day before trial. Demonstrative evidence prepared solely for the purpose of final argument shall be displayed to opposing counsel at the earliest possible time, but in no event later than one-half hour before the commencement of the arguments.

Exhibits deposited with the Court's Courtroom Deputy and appropriately marked may be used by any party at trial.

Each party should offer its exhibits into evidence as they are sought to be used at trial. An exhibit to be examined or displayed to the jury must be offered and admitted prior to examination or display. The admissibility of all exhibits referred to during trial and offered by the parties will be ruled upon by the Court at the time that they are identified. Either side may offer any marked exhibit regardless of which party marked it.

There is no requirement that counsel object to any exhibit at the Final Pretrial Conference. Counsel will confer in advance of trial and attempt to agree to admissibility of exhibits and to resolve objections to any exhibits.

Each counsel is responsible for any exhibits secured from the Courtroom Deputy. At the end of each trial session, all exhibits shall be returned to the Court's Courtroom Deputy.

In formulating a question to a witness dealing with an exhibit, counsel shall specify the exhibit number or designation so that the record will be clear.

Exhibits which are produced for the first time during trial, as in the case of exhibits used for impeachment, shall be tendered to the Court's Courtroom Deputy for marking and then copies should be provided to opposing counsel, the Court and the Court's Law Clerk.

The use of juror notebooks and visual aids by all counsel is at the discretion of counsel.

M. Depositions

Counsel shall submit to each other their deposition designations at least ten (10) business days before trial. Counsel will confer and attempt to resolve objections by agreement. If any objections remain, counsel shall jointly prepare a list of objections identifying the page number and line(s) of the deposition where the objection will be found and stating in one sentence the grounds for the objection. This procedure applies to both written and videotape depositions. Videotape depositions which contain objections must be accompanied by a full or, if agreed, partial transcript. The jointly prepared deposition designations list of objections and grounds for these objections must be delivered to the Court no later than five (5) business days prior to the commencement of trial.

Videotape presentations must include a method for editing the sound to delete testimony as to which the Court has sustained an objection.

N. Trial Briefs

Trial briefs are optional. If you decide to file a trial brief, it may be filed anytime before trial. All briefs shall comply with S.D. Ohio Civ. R. 5.1, with citations and references conforming to S.D. Ohio Civ. R. 7.2(b). Counsel should use their trial briefs to instruct the Court in advance of trial in any area of law upon which counsel will rely at trial. Therefore, the briefs should contain arguments, with citations to legal authority, in support of any evidentiary or other legal questions which may reasonably be anticipated to arise at trial.

O. Proposed Findings of Fact and Conclusions of Law

In a trial to the Court, the parties shall file Findings of Fact and Conclusions of Law which the parties believe are necessary to be made to support a favorable judgment. These shall be filed at the same time as the Joint Final Pretrial Order is submitted (five (5) business days before the Final Pretrial Conference).

P. Trial Motions and Motions *in Limine*

Motions *in limine* must be filed and served not later than seven (7) business days prior to the commencement of trial. Responses to the motion(s) shall be filed five (5) business days prior to the commencement of trial.

Any motions *in limine* addressed to the admissibility of expert testimony under *Daubert*, if not included in a previously filed motion for summary judgment, shall be filed at least forty-two (42) days prior to the Final Pretrial Conference. Responses to such motions shall be filed not later than thirty-five (35) days prior to the Final Pretrial Conference. No replies will be filed unless otherwise ordered by the Court.

In all cases, trial motions and motions *in limine* are to be exchanged with opposing counsel by hand delivery, facsimile, or email.

Q. Stipulations

Stipulated facts to be read to the jury shall be set forth in the Final Pretrial Order.

R. Summary of Deadlines

<i>Daubert</i> Motions (not previously filed)	Forty-two days prior to Final Pretrial Conference
Responses to <i>Daubert</i> Motions	Thirty-five days prior to Final Pretrial Conference
Final Pretrial Order	Five business days prior to Final Pretrial Conference
Proposed Findings of Fact and Conclusions of Law (Trial to Court)	Five business days prior to Final Pretrial Conference
Jury Instructions (no dispositive motions pending)	Five business days prior to Final Pretrial Conference
Jury Instructions (dispositive motions pending)	Ten business days prior to commencement of trial
Motions <i>in Limine</i>	Seven business days prior to commencement of trial
Responses to Motions in Limine	Five business days prior to commencement of trial
Deposition objections	Five business days prior to commencement of trial
Joint Statement of Case	Three days prior to commencement of trial
Exhibits	Three days prior to commencement of trial